

**MENTAL HEALTH ACT,
R.S.O. 1990, c. M.7**

101 FOR THE PRIMARY CARE
PHYSICIAN

RELATED LEGISLATION

- **HEALTH CARE CONSENT ACT, 1996,**
S.O. 1996, c. 2, Schedule A
- **SUBSTITUTE DECISIONS ACT, 1992,**
S.O. 1992, c. 30
- **MENTAL HEALTH ACT, R.S.O. 1990, c.**
M.7

CONSTITUTION ACT, 1982, R.S.C. 1985

- **CANADIAN CHARTER OF RIGHTS AND FREEDOMS**
- 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

10. Everyone has the right on arrest or detention

- (a) to be informed properly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus*, and to be released if the detention is not lawful.

HEALTH CARE CONSENT ACT, 1996

- **S. 10.(1)**
- **NO TREATMENT WITHOUT CONSENT.**

EXCEPTION: EMERGENCY

- S. 25 – HCCA
- Def: person is experiencing severe suffering or is at risk of sustaining serious bodily harm, if untreated.
- Examination without consent: necessary, incapable
- S. 26 – No treatment contrary to wishes.

No liability

- S. 29: Health practitioner not liable if acting in good faith.
- S. 30: SDM not liable if acting in good faith.
- [good Samaritan law]

CPSO GUIDELINES

- Capacity.
- Consent must be related to treatment.
- Consent must be informed.
- Consent must be voluntary.
- Consent must not be obtained through fraud or misrepresentation.

CAPACITY

- A person is capable with respect to a treatment or admission if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

L.B. v. Dr. Swaminath, (2003) Court File No. 2575/02
(Superior Court of Justice of Ontario)

- Doctor found patient capable when patient took medications.
- When patient stopped medications a month later, doctor found patient incapable.
- Board ruled in favour of the doctor, but the court reversed that decision.
- Court ruled that there was no evidence that the patient's condition changed within that month.

Dr. Fleming v. Prof. Scott Starson, (2003)
Supreme Court of Canada

- Bipolar affective disorder;
- Made death threats, found not criminally responsible;
- Found incapable, mother was the SDM;
- Board agreed with the doctor and found the patient incapable;
- Decision was overturned by Superior Court of Justice of Ontario;
- SCC agreed with SCJ.

Reasons

- Presumption of capacity (HCCA)
- Can be displaced only by evidence that the patient lacks the requisite elements of capacity;
- Patient was aware that “his brain was not functioning well”;
- Patient “appreciated” the intended effects of the medications;

Reasons (cont'd)

- The Board improperly used the patient's "best interests" to influence its finding of incapacity.
- Three SCC judges agreed with the Board (McLachlin C.J., Gonthier and LeBel JJ)
- Majority judges: Iacobucci, Major, Bastarache, Binnie, Arbour and Deschamps JJ)

HIERARCHY OF SUBSTITUTE DECISION MAKERS:

- Personal care guardian;
- Attorney for personal care;
- Representative appointed by Consent and Capacity Board;
- Spouse or partner;
- Child or parent or substitute parent;

HIERARCHY OF SDA:

- Parent with right of access only;
- Brother or sister;
- Any other relative; and
- Public Guardian and Trustee.

GUIDELINES FOR PHYSICIANS

- The physician must tell the incapable patient of the use of a substitute decision maker;
- The physician should involve both the patient and the SDM;
- If the patient disagrees with the finding of incapacity, the physician shall advise the patient to apply to Consent and Capacity Board for a review of the finding; and
- The physician shall reasonably assist the patient in the application.

MHA: Hospitalization

- S. 10: Admission may be refused if it is not urgent or necessary.
- S. 12: Informal or voluntary: in need of observation, care and treatment in a psychiatric facility.
- S. 15(1): Application for psychiatric assessment. See Form 1 of MHA.

Effect of Forms

- Form 1: 72 hours (not 3 days)
- Form 2: Justice of Peace orders examination at a psychiatric facility
- Form 3: Involuntary admission: 14 days
- Form 4: 1 month, 2 months and 3 months
- Followed by a mandatory review by the Consent and Capacity Board.

Form 1 – MHA
Application by Physician for Psychiatric Assessment

- Box A – Serious Harm Test
- Past – “has threatened...”
- Present – “is threatening ...”
- Future – “likely will result in ...”

Form 1 – MHA

Application by Physician for Psychiatric Assessment

- Box A – Serious Harm Test
- serious bodily harm to self,
- Serious bodily harm to others,
- substantial mental or physical deterioration, or
- serious physical impairment of self

Form 1 – MHA

Application by Physician for Psychiatric Assessment

- Box B – Incapable patients
- Previously treated;
- When untreated, likely will result in serious bodily harm to self, to others, substantial mental or physical deterioration or serious physical impairment of self

L.I., OT-04-2285, 2322

- Whether “bodily harm” included “psychological harm”;
- “bodily harm” not defined in MHA;
- The brain is obviously a part of the body;
- “Ordinary meaning” of the words.

Independent Assessment

- The physician who completes a Form 3 Certificate of Involuntary Admission must not be the same person who completed the Form 1.

Community Treatment Order

- Purpose: to provide a comprehensive plan of community-based treatment or care and supervision that is less restrictive than being detained in a psychiatric facility.

CTO Criteria

- pattern of “revolving door”: past admissions to psychiatric facilities, where his or her condition is usually stabilized; after being released from the facility, the person often stops to treatment or care and supervision; the person's condition changes, and as a result, the person must be re-admitted to a psychiatric facility.

Due Process

- Form 1 – patient must be served with Form 42 notice of reason for detention and right of appeal.
- Form 3 – patient must be served with Form 30 notice of reason for detention and right of appeal

Right to counsel

- Rights advisors in psychiatric facilities;
- Legal aid

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- (c) to have the validity of the detention determined by way of *habeas corpus*, and to be released if the detention is not lawful.

Chandrasena v. McDougald, [1989] O.J. No. 1743
(Ont. Dist. Ct.)

- Board revoked Form 3 because of defective Form 1.
- Doctor appealed.
- Court re-instated the certificate of involuntary admission which superseded the Form 1.